IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

DATATREASURY CORPORATION,	§	
Plaintiff	§	
	§	
v.	§	NO. 2:04cv85-DF
	§	
SMALL VALUE PAYMENTS	§	
COMPANY,	§	
Defendant.	§	

PLAINTIFF DATATREASURY CORPORATION'S SURREPLY IN OPPOSITION TO DEFENDANT SMALL VALUE PAYMENT COMPANY'S MOTION TO STAY

COMES NOW Plaintiff DataTreasury Corporation, and files the instant Surreply to the Motion to Stay filed Jan. 27, 2006 by Defendant Small Value Payments Company.

INTRODUCTION

Alhough SVPCo labels DataTreasury's Response "full of sound and fury, signifying nothing," (SVPCo Reply, pg. 2, *quoting* MacBeth, Act V, 5), SVPCo also felt compelled to reply thereto with an oversized, 13 page brief. "The lady doth protest too much, methinks."[1] Most of SVPCo's Reply is repetitive of its Motion to Stay, part is misrepresentation of DataTreasury's Response, and a small sliver is new argument. "'Tis better to be brief than tedious."[2] Hence, DataTreasury's Surreply will cut to the chase.

ARGUMENT

I. SINCE SVPCO CONCEDES THAT A CONSOLIDATION OF THE PRESENT SUIT WITH THE FEBRUARY 24, 2006 LAWSUIT WILL RESULT IN THE VERY RELIEF SVPCO SEEKS IN ITS MOTION TO STAY, THE MOTION TO STAY SHOULD BE DENIED.

SVPCo posits that a consolidation of this lawsuit with EDTX Cause No. 2:06-cv-72-DF (*DataTreasury Corp. v. Wells Fargo et. al.*) will result in "precisely the relief

[1] Hamlet, Act III, 2.

requested in the Stay Motion."[3] SVPCo Reply, pg. 5. SVPCo is correct – a consolidation of the two suits, with a new trial date set a year and a half to two years out, eviscerates the underlying justification for the stay which SVPCo requested.[4] If SVPCo is correct that the reexamination will be "brief" and the wait for the USPTO and/or appellate courts to review '988 and '137 will not be "protracted" (because, as SVPCo promises, the USPTO will proceed with "special dispatch"), then this Court will have the benefit (such as it may be) of the USPTO guidance which SVPCo touts long in advance of any trial of the consolidated suit. In the meantime, there is no reason to allow SVPCo (which is riding the coattails of another defendant which chose to initiate reexamination proceedings even as the clock was winding down on its own lawsuit) to shut down the forward movement of the case by avoiding the completion of discovery and other necessary steps preparatory to trial. Thus, consolidation of the two lawsuits against SVPCo will result in the same relief SVPCo seeks in its motion to stay, while still insuring that this case is trial-ready when '988 and '137 emerge from reexamination.

The proper, fairest and most efficient course, in light of all the circumstances, is to consolidate the two lawsuits, set a schedule with a trial date well beyond the time when defendants themselves claim the reexamination will bear fruit, and require the parties to move forward with the steps necessary to bring the consolidated suit to trial readiness.[5]

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[2] Richard III, Act I, 4.

[3] This is not entirely correct, since SVPCo's stay motion asks not only that "the trial date … be adjourned" (SVPCo Reply, pg. 5), but also that the litigation be shut down altogether, that discovery and pre-trial proceedings be frozen, and that the parties and Court simply shelve the case for so long as the reexamination drags on. Had SVPCo asked or suggested only that the **trial date** be adjourned until after the reexamination proceedings culminated, DataTreasury would have agreed to the request. But that is not what SVPCo is asking the Court to do.

[4] For this very reason, DataTreasury anticipates that SVPCo should have no legitimate basis to oppose consolidation. However, the parties have not yet conferred on this topic, and SVPCo may have separate reasons to contest consolidation. That bridge will be crossed shortly.

[5] As DataTreasury observed in the Response, even if the instant suit is not consolidated with the suit filed February 24, 2006, SVPCo's argument for a stay is eviscerated. Since SVPCo has no basis for avoiding

II. SVPCO'S REPLY IS REPLETE WITH INCORRECT AND MISLEADING CHARACTERIZATION'S OF DATATRESURY'S REPLY.

(1) "DataTreasury's Response does not dispute any of the benefits discussed in the Stay Motion." SVPCo Reply, pg. 4. Not true – *see* Response, pp. 7-11, 15-20 (challenging SVPCo's assertions about the benefits from reexamination proceedings).

(2) "The Issues in This Litigation **Will** Be Affected By the Results of the Reexams." SVPCo Reply, pg. 5 (emphasis added). Not necessarily true, and belied by SVPCo's own statement a few pages later that "[n]o one can predict what the results of the Reexams will be." SVPCo Reply, pg. 7. One possible result is that each and every one of the claims of '988 and '137 will come out of reexamination unchanged, as occurs in about 1 of every 3 reexaminations initiated by third parties. Should such prove the case, the issues in this litigation would be wholly unaffected by the reexamination, particularly since – as DataTreasury earlier noted (Response, pp. 16-18), SVPCo has refused to be bound by the outcome of the reexaminations.[6] Another possibility is that one or more of the claims alleged against SVPCo will be amended, while others remain the same. In that case, nothing of significance would change. It is precisely because "[n]o one can predict

litigation on the new patents asserted against it – which are not in reexamination - the idea that the parties will suddenly encounter dramatic time or money efficiencies as a result of the stay SVPCo requests on the '988/'137 litigation fails. SVPCo's only remaining argument – that the Court and parties may have to endure some form of a "do-over" or a disruption of the case if the USPTO reexamination proceedings culminate after a trial of this cause or near thereto, is easily addressed and ameliorated by setting a trial date of the consolidated lawsuit after the timeframe when SVPCo itself theorizes that the USPTO will conclude the reexamination proceedings.

[6] SVPCo struggles to justify that maneuver, ascribing its refusal to be bound by the results of the reexamination to the fact that the invalidity standards and procedures are different in the courts and the USPTO, and that different evidence of prior art may be advanced or acceptable to challenge validity. SVPCo Reply, 9. This proves the point DataTreasury advanced in the Response. Despite the noble-sounding pronouncements about judicial efficiency which permeate SVPCo's Motion to Stay, this motion is not about that at all - it is purely a litigation tactic. Rather than defend itself, SVPCo wants to sit back and hope something good happens in the USPTO reexamination, all the while intending to take a second bite at the apple if the USPTO decision goes against the defendants.

what the results of the Reexams will be" that unilaterally sought litigation stays pending reexamination are so disfavored in the Eastern District of Texas.[7]

(3) "A decision from the PTO on the invalidity and/or a change in the scope of the claims at issue **necessarily affects** this litigation. DT does not argue otherwise in its Response." SVPCo Reply, pg. 5 (emphasis added). Neither statement is true.[8] First, **because** "DataTreasury alleges that SVPCo literally infringes all of the claims of ['988 and '137]" (*Id.*), the USPTO's decision on the 93 claims which comprise these two patents is highly unlikely to significantly affect this litigation. According to the evidence SVPCo submitted to the Court earlier, in 88% of all reexaminations initiated by third parties (almost 9 out of 10), either all or some claims are affirmed and emerge unscathed. SVPCo, of course, need only infringe one claim of the 93 alleged against it to entitle DataTreasury to money damages and a permanent injunction against infringing activity.[9]

(4) "DataTreasury describes the Reexams as 'mundane' …" SVPCo Reply, pg. 7. Not true – DataTreasury described the **grant of a reexamination request** as a mundane occurrence, which it is, since such treatment is accorded more than 9 of every 10 requests, and according to the Federal Circuit "although surely evidence the criterion for reexamination has been met … does not establish a likelihood of patent invalidity."

[7] *See, e.g., Soverain Software LLC v. Amazon.Com*, 356 F.Supp.2d 660, 663 (E.D. Tex. 2005)("staying the case, based solely on speculation of what might possibly happen during reexamination, would be inefficient and inappropriate"). *See also MicroUnity Systems Engineering, Inc. v. Dell, Inc.*, 2:04CV120 (E.D. Tex., Marshall Div., Aug. 15, 2005) (Doc. 152); *Amiga Development LLC v. Hewlett Packard Co.*, No. 2:04CV-242 (E.D.Tex., Marshall Div., Feb. 16, 2006)(Doc. 95).

[8] DataTreasury not only "argue[d] otherwise," but conclusively refuted this notion in its Response. *See* Response, pp. 7-8, 10, 16-20.

[9] SVPCo's assertion that "DataTreasury's efforts "have been focused on extracting licensing fees" (SVPCo Reply, pg. 10) is not well-founded. Though no case has yet proceeded to trial, such that the Court would have opportunity to hear from DataTreasury on injunctive relief, DataTreasury will seek such relief, and has received such relief in settlement previously.

Hoechst Celanese Corp., v. BP Chemicals, Ltd., 78 F.3d 1575, 1584 (Fed. Cir.), *cert. denied*, 519 U.S. 911 (1996).

(5) "Notably absent from the Response is any description of what efforts DT has made to prosecute its claims …" SVPCo Reply, pg. 10. Not true – *see* Response, pp. 2-5. DataTreasury's account of all that has transpired in the suit is uncontested, and accordingly may be deemed stipulated.

CONCLUSION

The frank reality of reexaminations, litigation stays, and the applicable precedent is that either party can cite an impressive array of authority to support whatever outcome they seek. Some judges typically stay cases when a reexamination is granted during litigation, some judges do not. Indeed, a reading of the body of precedent shows that the outcome says much more about judicial philosophy and approach to case management than about factual particulars or nuances of a multi-factor balancing test. Not surprisingly, DataTreasury believes justice is best served when parties are not rewarded with a stay for having waited until deep into patent litigation to request reexamination. Equally unsurprising, SVPCo thinks it much fairer and more efficient to stay an ongoing lawsuit when a reexamination is sought during litigation.

No stay should be granted in this case. Application of the relevant factors to the circumstances at bar dictate a rejection of the Defendant's bid to stay this lawsuit and thereby further evade responsibility for the infringing acts for which DataTreasury seeks redress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all counsel of record via electronic transmission on the 27th day of March, 2006.

ANTHONY K. BRUSTER